(2)

95-1153

No. ~~94-2237~~

Supreme Court, U.S.
FILED
FEB 14 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

PATRICK BOYLE, JAMES DAUGHERTY, P. DAN GILBERT, LARRY JORDAN, CHARLES MALONEY, THOMAS MARTIN, ROBERT SCHWARTZBAUER, and GARY THADEN, as the Board of Trustees of the Twin City Pipe Trades Welfare Trust, et al.,

Petitioners,

vs.

MATTHEW G. SMITH, in his capacity as the Commissioner of the Minnesota Department of Revenue, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

RICHARD S. SLOWES
Assistant Solicitor General
Counsel of Record

1100 NCL Tower
445 Minnesota Street
St. Paul, MN 55101-2128
(612) 282-5712

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

31pp

QUESTIONS PRESENTED

1. Is a 2% state tax on gross revenues of hospitals and other health care providers that the providers may pass on to third party payers for health services, including self-insured ERISA plans, preempted by ERISA because it may increase the cost of health care services paid for by the plans?

2. Do trustees of self-insured ERISA health benefit plans have standing to challenge the validity of state statutory requirements for reporting of data by group purchasers of health care services from which self-insured ERISA plans have been exempted by administrative rule?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 10

I. THE COURT OF APPEALS' DECISION THAT THE MINNESOTACARE TWO PERCENT TAX ON HEALTH CARE PROVIDERS IS NOT PREEMPTED BY ERISA IS CONSISTENT WITH THIS COURT'S DECISION IN *TRAVELERS* AND DOES NOT WARRANT REVIEW 10

II. THE COURT OF APPEALS CORRECTLY DECIDED THAT PETITIONERS HAVE NO STANDING TO CHALLENGE DATA COLLECTION AND REPORTING REQUIREMENTS THAT THE STATE ENFORCEMENT AUTHORITY HAS DECIDED DO NOT APPLY TO ERISA PLANS 17

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

ABC National Line Erection Apprenticeship Training Trust v. Aubry, 68 F.3d 343 (9th Cir. 1995) 16

Arkansas Blue Cross and Blue Shield v. St. Mary's Hospital, Inc., 947 F.2d 1341 (8th Cir. 1991), *cert. denied*, 112 U.S. 2305 (1992) 6, 8

Babbitt v. United Farm Workers National Union, 442 U.S. 289 (1979) 18, 19, 20, 21, 23

KVUE, Inc. v. Moore, 709 F.2d 922 (5th Cir. 1983), *aff'd sub nom. Texas v. KVUE, Inc.*, 465 U.S. 1092 (1984) 22

Michigan State Chamber of Commerce v. Austin, 788 F.2d 1178 (6th Cir. 1986) 21

New England Health Care Employees Union v. Mt. Sinai Hosp., 65 F.3d 1024, 1031 (2d Cir. 1995) 14

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company, ___ U.S. ___, 115 S. Ct. 1671 (1995) ..... *passim*

Seattle School District No. 1 v. Washington, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982) 22

Signorelli v. Evans, 637 F.2d 853 (2d Cir. 1980) 22

Travelers Ins. Co. v. Pataki, 63 F.3d 89 (2d Cir. 1995) 14

Travelers Insurance Company v. Cuomo, 14 F.3d 708 (2d Cir. 1993), *rev'd sub nom. New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___, 115 S. Ct. 1671 (1995) 8, 9

United Food and Commercial Workers International Union v. IPB, Inc., 857 F.2d 422 (8th Cir. 1988) 21

TABLE OF AUTHORITIES – Continued

Page

United Wire, Metal and Machine Health and Welfare Fund v. Morristown Memorial Hospital, 995 F.2d 1179 (3d Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 382 (1993) 8

Wilson v. Stocker, 819 F.2d 943 (10th Cir. 1987)..... 22

CONSTITUTIONAL PROVISIONS

United States Constitution, Art. III.....18, 23

United States Constitution, First Amendment..... 22

FEDERAL STATUTES

Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* (1994) 5

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1994)..... *passim*

ERISA § 514(a), 29 U.S.C. § 1144(a) (1994) 6, 12

29 U.S.C. § 1003(a) (1994)..... 6

29 U.S.C. § 1003(b) (1994)..... 6

STATE STATUTES

Act of May 10, 1994, ch. 625, art. 1 and 3, 1994 Minn. Laws 1508 and 1535 1

Act of May 25, 1995, ch. 234, art. 5, § 22, 1995 Minn. Laws 2193 .....5, 18

Act of May 25, 1995, ch. 234, art. 5, § 24, 1995 Minn. Laws 2193 .....5, 18

Health Right Act, ch. 549, 1992 Minn. Laws 1487 1

TABLE OF AUTHORITIES – Continued

Page

MinnesotaCare Act, art. 3, 5, and 7, 1992 Minn. Laws 1536-54, 1567-79, and 1584-94 2

MinnesotaCare Act, art. 9, § 2, 1992 Minn. Laws 1608 2

MinnesotaCare Act, art. 9, § 7, 1992 Minn. Laws 1613 2

MinnesotaCare Act, art. 9, §§ 14-17, 1992 Minn. Laws 1616-17 2

MinnesotaCare Act, art. 9, § 22, 1992 Minn. Laws 1618-19 2

Minn. Stat. § 14.05, subd. 1 (1994) 5

Minn. Stat. § 14.38 (1994) 21

Minn. Stat. §§ 62J.015-.05 (1994 and Supp. 1995) 2

Minn. Stat. §§ 62J.04-.042 (1994 and Supp. 1995) 2

Minn. Stat. § 62J.321, subd. 6 (1994) 5

Minn. Stat. § 62J.35 (1994) 4, 5, 17, 18

Minn. Stat. § 62J.38 (1994) 4, 17

Minn. Stat. §§ 256.9351-.9363 (1994 and Supp. 1995) 1

Minn. Stat. § 295.52 (1994) 2, 3

Minn. Stat. § 295.582 (Supp. 1995) 4

OTHER AUTHORITIES

Minn. R. ch. 4650 (Supp. 1996) 4, 5

Minn. R. ch. 4651 (Supp. 1996) 5

Minn. R. ch. 4652 (Supp. 1996) 4, 5

Minn R. 4652.0110, subp. 1.C (1995) 5, 18

TABLE OF AUTHORITIES – Continued

Page

19 State Register 1515 (January 17, 1995)..... 18

"Proposed Permanent Rules Relating to Aggregate Health Care Financial and Statistical Data From Group Purchasers," 20 State Register 1030 (Nov. 6, 1995) 18

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for writ of certiorari seeking review of the decision of the Eighth Circuit Court of Appeals in this case. That opinion (Pet. App. A-1 – A-37) is reported at 68 F.3d 1093. The opinion of the district court (Pet. App. A-38 – A-60) is reported at 849 F. Supp. 1307.

STATEMENT OF THE CASE

This case concerns petitioners' claims that two provisions of the State of Minnesota's recent health care reform legislation are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* (1994).

In April 1992, Minnesota enacted a broad-based plan for health care reform, known as the MinnesotaCare Act.[1] There are two main elements of the reform. One is a state-run program of health coverage for low-income uninsured people, itself known as MinnesotaCare. Minn. Stat. §§ 256.9351-.9363 (1994 and Supp. 1995). The other major element is cost containment. The Act created a state Health Care Commission to make recommendations for, among other things, the restructuring of the health care

[1] As initially enacted, the law was entitled the Minnesota Health Right Act. Health Right Act, ch. 549, 1992 Minn. Laws 1487. The law and its programs are now known as MinnesotaCare. In subsequent years the legislature enacted supplemental legislation to implement and refine the reform programs. *E.g.*, Act of May 10, 1994, ch. 625, art. 1 and 3, 1994 Minn. Laws 1508 and 1535.

delivery system in Minnesota in order to rein in the escalation of health care costs. Minn. Stat. §§ 62J.015-.05 (1994 and Supp. 1995). The cost containment package also includes provision for limits to be set on the growth of health care spending. Minn. Stat. §§ 62J.04-.042 (1994 and Supp. 1995). In addition to these two principal efforts regarding access to health care and cost containment, the Act also includes measures directed at insurance reform, rural health care issues, and health data and research issues. MinnesotaCare Act, art. 3, 5, and 7, 1992 Minn. Laws 1536-54, 1567-79, and 1584-94.

These multiple efforts of the MinnesotaCare law are funded by a variety of sources. A cigarette tax increase went into effect July 1, 1992 to provide startup and reserve funds. MinnesotaCare Act, art. 9, §§ 14-17, 1992 Minn. Laws 1616-17. On January 1, 1993, a 2% tax on gross patient revenues of hospitals went into effect. *Id.*, § 7, 1992 Minn. Laws 1613. On January 1, 1994, a 2% tax on gross revenues of non-hospital health care providers went into effect, as well as a 2% tax on prescription drugs at the wholesale level. *Id.* On January 1, 1996, a 1% gross premiums tax on non-profit health insurers, such as Blue Cross/Blue Shield and HMOs, took effect. *Id.*, § 2, 1992 Minn. Laws 1608; *id.*, § 22, 1992 Minn. Laws 1618-19 (effective dates for tax provisions). The provider taxes are now codified at Minn. Stat. § 295.52 (1994); Pet. App. A-91.

The main focus of this litigation is the MinnesotaCare provider tax and the ability of hospitals and health care providers to pass through the cost of the tax to ERISA health benefit plans. This can be done in either of two

ways. First, the law expressly permits a provider to transfer the expense of the 2% tax to third party purchasers, such as insurance companies, HMOs, or as particularly relevant to this lawsuit, self-insured employee health plans. The passthrough provision of the law states in relevant part:

> (a) A hospital, surgical center, pharmacy, or health care provider that is subject to a tax under section 295.52, or a pharmacy that has paid additional expense transferred under this section by a wholesale drug distributor, may transfer additional expense generated by section 295.52 obligations on to all third-party contracts for the purchase of health care services on behalf of a patient or consumer. The additional expense transferred to the third-party purchaser must not exceed two percent of the gross revenues received under the third-party contract, and two percent of copayments and deductibles paid by the individual patient or consumer. The expense must not be generated on revenues derived from payments that are excluded from the tax under section 295.53. All third-party purchasers of health care services . . . must pay the transferred expense in addition to any payments due under existing or future contracts with the hospital, surgical center, pharmacy, or health care provider, to the extent allowed under federal law. A third-party purchaser of health care services includes, but is not limited to, a health carrier, integrated service network, or community integrated service network that pays for health care services on behalf of patients or that reimburses, indemnifies, compensates, or otherwise insures patients for health care services. A third-party purchaser shall comply with this

> section regardless of whether the third-party purchaser is a for-profit, not-for-profit, or non-profit entity. . . . Nothing in this subdivision limits the ability of a hospital, surgical center, pharmacy, wholesale drug distributor, or health care provider to recover all or part of the section 295.52 obligation by other methods, including increasing fees or charges.

Minn. Stat. § 295.582 (Supp. 1995).[2]

Wholly independent of the MinnesotaCare law, providers also retain whatever legal right they might otherwise have to recover the cost of the 2% tax from purchasers of their services by increasing their charges, just as they would with any other cost of doing business. To avoid any ambiguity, the MinnesotaCare law clarifies that the statutory passthrough provision is not intended to limit the ability of a provider to recover all or a part of its tax obligations by other methods.

The other aspect of the law at issue here is the data reporting requirement. To provide a foundation for the establishment of limits on the growth of health care spending, the original MinnesotaCare Act contained provisions for the collection by the Commissioner of Health of data from providers and purchasers of health care. Minn. Stat. §§ 62J.35 and .38 (1994); Pet. App. A-79 and A-81, respectively. The commissioner promulgated administrative rules implementing these data reporting requirements. Minn. R. chs. 4650 and 4652 (Supp. 1996).

---

[2] The version of section 295.582 as it existed prior to amendments in 1994 and 1995 is reproduced in Petitioners' Appendix at A-97. The amendments do not affect the issues in this case.

The rule concerning reporting by group purchasers exempts self-funded ERISA plans from the reporting requirements. Minn R. 4652.0110, subp. 1.C (1995) provides: "An employee plan offered by a self-funded employer or an employee organization is not subject to the reporting requirements of chapter 4652. However, those employee health plans are encouraged to comply with these reporting requirements." Pet. App. A-108.[3]

This lawsuit was commenced on June 4, 1993. Petitioners are the trustees of thirteen self-insured ERISA-based welfare benefit plans that provide health care benefits to their members. They alleged that ERISA and the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* (1994) ("LMRA") preempt the passthrough to their plans of any part of the 2% gross revenues tax imposed by the law on hospitals and other health care providers. Petitioners also claimed that MinnesotaCare data reporting requirements and the health care spending caps are preempted by ERISA.[4] Petitioners' ERISA preemption

---

[3] While this case was pending before the court of appeals, the 1995 Minnesota Legislature amended the data collection provisions of the law. Included in the amendments was repeal of Minn. Stat. § 62J.35. Act of May 25, 1995, ch. 234, art. 5, § 24, 1995 Minn. Laws 2193. The legislature also expressly provided that the previously-promulgated administrative rules concerning data reporting would remain in effect. *Id.*, § 22, 1995 Minn. Laws 2193. Section 22 provides: "Notwithstanding Minnesota Statutes, section 14.05, subdivision 1, *Minnesota Rules, chapters* 4650, 4651, and *4652, shall continue in effect* under the authority granted in Minnesota Statutes, section 62J.321, subdivision 6." (Emphasis added.)

[4] Petitioners have apparently abandoned their claims based on the LMRA and the health care spending caps at this stage of the litigation.

argument is based on section 514(a) of ERISA, which provides that ERISA shall "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." 29 U.S.C. § 1144(a) (1994).

The district court granted summary judgment to respondents.[5] Pet. App. A-38. The court rejected petitioners' challenge to the data reporting provisions for two related reasons. First, the court ruled that petitioners do not have standing to challenge the reporting provisions because the rule promulgated by the commissioner does not require self-insured employee health plans to comply with the reporting requirements. The court also concluded that petitioners were asking the court for an advisory opinion because their claim is based on the hypothetical possibility of future application of the reporting requirements to self-insured ERISA plans.

In evaluating petitioners' ERISA preemption challenge to the provider tax, the court first determined that the provider tax is one of "general application," in that it does not treat ERISA plans differently than other third-party purchasers of health care services. The district court applied a multi-factor analysis adopted by the Eighth Circuit Court of Appeals in *Arkansas Blue Cross and Blue*

---

[5] Respondents are the Commissioners of the Minnesota Departments of Revenue, Health, and Human Services. Each of those departments has responsibility for some aspect of the MinnesotaCare program. The director of the program that provides health care coverage to low-income uninsured people in the state is also a respondent.

Shield v. St. Mary's Hospital, Inc., 947 F.2d 1341 (8th Cir. 1991), *cert. denied*, 112 U.S. 2305 (1992), to determine if laws of general application are preempted by ERISA. The factors are: (1) whether the state law negates a provision of an ERISA plan, (2) whether the state law affects relations between primary ERISA entities, (3) whether the state law has an impact on the structure of ERISA plans, (4) whether the state law has an impact on the administration of ERISA plans, (5) whether the state law has an economic impact on ERISA plans, (6) whether preemption of the state law is consistent with other ERISA provisions and (7) whether the state law is an exercise of traditional state power. Pet. App. A-47.

The court concluded that none of the factors favored preemption. The court found that the provider tax does not negate any plan provisions nor conflict with any ERISA statutory provisions. Petitioners argued that both plan and ERISA provisions requiring use of plan resources for the exclusive benefit of plan beneficiaries would be violated because provider tax revenues fund health care benefits for MinnesotaCare program participants. The court reasoned that the "exclusive benefit" provisions in the plan and ERISA were intended to establish fiduciary responsibility for plan assets, but not to have the sweeping impact that would result from adoption of petitioners' indirect benefit theory. The court also found that passthrough of the provider tax has no effect on primary ERISA entities or on plan structure. The court found, based on petitioners' answers to interrogatories, that there had been no changes in plan structure, relationships or operations as a result of implementation of the provider tax. The court rejected petitioners' argument

that the ultimate benefit to MinnesotaCare program participants from the provider tax revenues improperly made them beneficiaries of the ERISA plans. Next, again based on petitioners' answers to interrogatories, the district court found that passthrough of the provider tax imposed no burden on the administration of the plan, either from an intrastate or interstate perspective. The court also rejected petitioners' argument on the economic impact factor. Based primarily on the Second Circuit ruling in *Travelers Insurance Company v. Cuomo*, 14 F.3d 708 (2d Cir. 1993) ("*Cuomo*"), *rev'd sub nom. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___, 115 S. Ct. 1671 (1995), petitioners argued that the provider tax should be preempted by ERISA simply because it indirectly increases the costs incurred by the plans. The court found more persuasive the reasoning of the Third Circuit in *United Wire, Metal and Machine Health and Welfare Fund v. Morristown Memorial Hospital*, 995 F.2d 1179 (3d Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 382 (1993). The district court agreed with the Third Circuit that Congress could not have intended ERISA preemption to insulate ERISA plans from the indirect economic costs that result from many types of state regulation, including hospital surcharges and provider taxes. Because none of the *Arkansas Blue Cross-Blue Shield* factors favored preemption, the court rejected petitioners' challenge to the provider tax.

The court of appeals affirmed. Pet. App. A-1. For the same reasons expressed by the district court, the Eighth Circuit held that petitioners lacked standing to challenge the data reporting provisions. On the provider tax preemption issue, petitioners on appeal urged the court to

adopt a new test for ERISA preemption applicable specifically to state tax statutes. Relying on the Second Circuit *Cuomo* decision, petitioners argued that a tax law that has any indirect economic impact on an ERISA plan should be preempted by ERISA. Pet. App. A-20. The court of appeals instead applied the same multi-factor analysis the district court had used, reaching the same conclusions that none of the factors warranted preemption of the MinnesotaCare provider tax. The court's rejection of petitioners' indirect economic impact argument was buttressed by this Court's decision reversing *Cuomo*, which was issued while this case was pending in the Eighth Circuit. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___, 115 S. Ct. 1671 (1995) ("*Travelers*"). The court also rejected petitioners' exclusive benefit theory, found that none of the plans had been required to change their structure, administration or practices in any way to comply with the passthrough of the provider tax and ruled that the only impact of the law, which was potentially to increase the costs paid by the plans for health care services by no more than two percent,[6] was not sufficient to warrant preemption. The court concluded:

---

[6] Respondents pointed out that the economic impact of the MinnesotaCare law would likely be less than two percent, because the cost of the provider tax passed through would be offset by reduction in the uncompensated care costs normally included in health care provider charges that would result from the MinnesotaCare program's provision of health care to otherwise uninsured patients. The court acknowledged the plausibility of this position, but concluded that even the full 2% would not weigh in favor of preemption. Pet. App. A-27, n.5.

> The factors of economic impact, effect on primary ERISA entities and impact on plan structure, whether the statute negates a plan provision or relates to other ERISA statutory provisions, and impact on administration of ERISA plans, clearly lead to the conclusion that MinnesotaCare has only a tenuous, remote and peripheral affect [sic] on the plans. ERISA does not preempt the provider tax.

Pet. App. A-31.

REASONS FOR DENYING THE PETITION

There is no reason for the Court to grant review in this case. The decision of the court of appeals is neither contrary to decisions of this Court nor those of any circuit court of appeals. There is no need for the Court to clarify the principles of ERISA preemption so recently enunciated in the *Travelers* case. Nor is there any necessity to review the Eighth Circuit's application of well-established principles of justiciability to the particular circumstances of this case.

I. THE COURT OF APPEALS' DECISION THAT THE MINNESOTACARE TWO PERCENT TAX ON HEALTH CARE PROVIDERS IS NOT PREEMPTED BY ERISA IS CONSISTENT WITH THIS COURT'S DECISION IN *TRAVELERS* AND DOES NOT WARRANT REVIEW.

Petitioners argue that there is a need for this Court "to provide further clarification with respect to the numerous and inconsistent appellate court decisions

relating to ERISA preemption in the context of a statute's economic impact upon ERISA regulated self-funded health plans." Pet. at 4. That guidance has already been provided, however, in this Court's unanimous opinion just last Term in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, ___ U.S. ___, 115 S. Ct. 1671 (1995). The argument presented in the petition is essentially a rehash of the Second Circuit's theory that a state law that has any indirect economic impact on ERISA plans is preempted. That theory was clearly rejected by this Court in *Travelers*, and there is no sound reason to revisit it so soon in the context of only slightly different statutory provisions and factual circumstances.

In *Travelers*, the Court addressed an ERISA preemption challenge to a New York hospital rate-setting system that imposed surcharges of 13%, 11%, and 9% over and above the normal hospital rates on patients whose health care was paid for by commercial insurers and other health care payers, but did not impose the surcharges on patients with coverage from Blue Cross/Blue Shield. The Second Circuit held the surcharges were preempted by ERISA because the added cost of the surcharges would constitute a significant indirect economic impact on ERISA plans that purchased their coverage from entities subject to the surcharges. Reversing the Second Circuit, the Court explained that "[t]he basic thrust of the [ERISA] preemption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Travelers*, ___ U.S. at ___, 115 S. Ct. at 1677-78. Responding to the argument about the indirect economic effect of the

surcharges on ERISA plans, the Court noted that there is a wide variety of common state regulation that "will indirectly affect what an ERISA or other plan can afford or get for its money," noting quality standards and basic regulation of employment conditions as examples. *Id.* at ___, 115 S. Ct. at 1679. The Court concluded that:

> to read the pre-emption provision as displacing all state laws affecting costs and charges on the theory that they indirectly relate to ERISA plans . . . would effectively read the limiting language in § 514(a) out of the statute, a conclusion that would violate basic principles of statutory interpretation . . . .

Id. Thus, the Court rejected the Second Circuit's broad principle that state regulation with indirect economic effect on ERISA plans would be preempted. The Court emphasized this later in its opinion:

> It remains only to speak further on a point already raised, that any conclusion other than the one we draw would bar any state regulation of hospital rates. The basic DRG system (even without any surcharge), like any other interference with the hospital services market, *would fall on a theory that all laws with indirect economic effects on ERISA plans are pre-empted under § 514(a). This would be an unsettling result* and all the more startling because several states, including New York, regulated hospital charges to one degree or another at the time ERISA was passed . . . .

Id. at ___, 115 S. Ct. at 1681 (emphasis added).

Contrary to petitioners' argument, the decision of the court of appeals here is neither contrary to the intent of

the Congress in enacting the ERISA preemption clause nor in conflict with this Court's reasoning in *Travelers*. Indeed, in describing the purpose of ERISA preemption, the court of appeals quoted this Court's explanation from *Travelers* (quoted above) that the basic purpose of the preemption clause was to avoid inconsistent state regulation that would interfere with the nationally uniform administration of employee benefit plans. Pet. App. A-5 (quoting from *Travelers*, ___ U.S. at ___, 115 S. Ct. at 1677-78). The court of appeals correctly found that the record of this case showed that the two percent provider tax has created no impediment to nationally uniform administration of petitioners' plans. Indeed, the tax has had no impact whatsoever on the structure, administration, and operations of the plans. Therefore, the core purpose of the preemption provision is not frustrated in any way by the provider tax.

The court of appeals accurately perceived that the only impact of the MinnesotaCare provider tax is potentially to increase the costs of health care purchases by petitioners' plans by no more than two percent. As discussed above, the contention that a state law is preempted solely because it indirectly increases the costs incurred by an ERISA plan was rejected by the Court in *Travelers*. Petitioners attempt to disguise their request for reconsideration of *Travelers* in different clothing by arguing that the provider tax should be preempted because it is an indirect means of doing what ERISA would not allow to be done directly. However, precisely the same argument could be made about the New York hospital surcharges. In Minnesota, the tax is imposed on the health care provider and ultimately may be passed on to

the third party payer for the health care provided. In New York, the hospital surcharges were imposed on the patient and ultimately were passed on to the third party payer for the health care provided to that patient. Legally, there is no significant difference and no basis for the Court to revisit its *Travelers* decision in this similar context.[7]

Attempting to create the appearance of a conflict between the court of appeals' decision and *Travelers*, petitioners rely on the Court's discussion of the effect of the New York hospital surcharges on choices made by ERISA plans in the purchase of health care coverage. Petitioners contend that a state law that has indirect economic impact can survive an ERISA preemption challenge only if it permits a similar choice. Petitioners misconstrue the point of the Court's discussion of choice. The commercial insurance companies argued in *Travelers* that the surcharge system should be preempted because the price

---

[7] Although not raised in the Petition, it could be suggested that this case differs from *Travelers* because it concerns impact on self-insured ERISA plans. The Court in *Travelers* did not address preemption of the surcharges as they might affect self-insured ERISA plans, because the Second Circuit had not reached that issue. On remand, the Second Circuit concluded that the reasoning of the Court in *Travelers* compelled the same conclusion: that indirect economic impact even on self-insured ERISA plans would not be preempted. *Travelers Ins. Co. v. Pataki*, 63 F.3d 89 (2d Cir. 1995). *See also New England Health Care Employees Union v. Mt. Sinai Hosp.*, 65 F.3d 1024, 1031 (2d Cir. 1995) (state system of hospital surcharges to create uncompensated care fund not preempted as to self-insured ERISA plans). Thus, the circuit courts are in agreement on that issue.

differential resulting from the surcharges would influence the choices that ERISA plans would make in choosing their health care carriers. Indeed, that was at least in part the purpose of the surcharges: to direct more business to the Blues. *Travelers*, ___ U.S. at ___, 115 S. Ct. at 1678-79. The Court reasoned that an indirect economic impact that might influence such choices would not be preempted as long as it did not go so far as to mandate a *particular* choice. The Court explained:

> The New York surcharges do not impose the kind of substantive coverage requirement binding plan administrators that was at issue in *Metropolitan Life*. Although even in the absence of mandated coverage there might be a point at which an exorbitant tax leaving consumers with a Hobson's choice would be treated as imposing a substantive mandate, no showing has been made here that the surcharges are so prohibitive as to force all health insurance consumers to contract with the Blues.

Id. at ___, 115 S. Ct. at 1681. The Court concluded:

> We acknowledge that a state law might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers, and that such a state law might indeed be preempted under section 514. But as we have shown, New York's surcharges do not fall into either category; they affect only indirectly the relative prices of insurance policies, a result no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate.

Id. at ___, 115 S. Ct. at 1683. There is no suggestion in the record, or even in petitioners' argument, that the pass-through of the two percent MinnesotaCare provider tax has any influence on the scheme of substantive coverage employed by ERISA plans. As noted, the only impact is potentially to increase costs by a margin of no more than two percent. The impact of the New York hospital surcharges was far greater, yet was not preempted.

Petitioners seem to contend, or at least suggest, that the only type of law that may increase costs and avoid preemption is one that gives the ERISA plans the ability to avoid the increased cost altogether by choosing an option that imposes no added cost. But, as the Court noted, there are myriad state laws that impose indirect costs on ERISA plans that are not optional. For example, the fact that plans cannot choose to opt out of paying the increased cost attributable to OSHA regulation of hospitals doesn't invalidate those laws. *Travelers* never suggested, nor did Congress intend, that only those laws that ERISA plans can choose to avoid escape preemption.

Just as petitioners have failed to identify any real conflict with the *Travelers* decision, they have utterly failed to identify any conflict between the decision in this case and that of any other circuit court of appeals. Numerous courts have cited and applied *Travelers*, yet petitioners mention only one, *ABC National Line Erection Apprenticeship Training Trust v. Aubry*, 68 F.3d 343 (9th Cir. 1995). The holding of the Ninth Circuit in *ABC National* is limited to the issue of the standing of an apprenticeship trust fund to challenge a California prevailing wage law

on ERISA preemption grounds. It is not surprising, therefore, that petitioners utterly fail to explain how that decision is in conflict with or in any way relates to the decision on the MinnesotaCare provider tax.

In summary, petitioners have presented no sound reason for the Court to grant certiorari on the provider tax issue.

II. THE COURT OF APPEALS CORRECTLY DECIDED THAT PETITIONERS HAVE NO STANDING TO CHALLENGE DATA COLLECTION AND REPORTING REQUIREMENTS THAT THE STATE ENFORCEMENT AUTHORITY HAS DECIDED DO NOT APPLY TO ERISA PLANS.

Petitioners also seek review of the decision of the court of appeals that they lack standing to challenge the data reporting provisions of the MinnesotaCare Act. As originally enacted and until amended in 1995, two separate sections of the Minnesota law provided for collection of data from a variety of participants in the health care system by the Commissioner of Health. Minn. Stat. §§ 62J.35 and .38 (1994), Pet. App. A-79 and A-81, respectively. One provision, section 62J.35, expressed the commissioner's responsibility to collect the data in permissive language, and the other provision, section 62J.38, expresses it in mandatory language. The commissioner resolved this apparent conflict in favor of the permissive language, and in the administrative rules implementing the data collection provisions for third party purchasers expressly exempted self-insured ERISA plans. They are merely encouraged to report their data.

Minn. R. 4652.0110, subp. 1(C) (1995).[8] Minn. Stat. § 62J.35, the permissively-worded provision, was repealed by the 1995 Minnesota Legislature. Act of May 25, 1995, ch. 234, art. 5, § 24, 1995 Minn. Laws. 2193. However, in the same act the legislature expressly provided that the administrative rules previously promulgated by the commissioner, including chapter 4652 that contains the exemption for self-insured ERISA plans, would remain in effect. *Id.*, § 22, 1995 Minn. Laws 2193 (quoted at 4, *supra*). Accordingly, the legislature endorsed and ratified that exemption. Furthermore, in proposing amendments to the rules in November 1995, following the court of appeals' decision in this case, the commissioner retained the exemption for ERISA plans. "Proposed Permanent Rules Relating to Aggregate Health Care Financial and Statistical Data From Group Purchasers," 20 State Register 1030 (Nov. 6, 1995).

The courts below applied well-established principles of justiciability under Article III of the Constitution and correctly determined that petitioners have no standing to challenge these reporting requirements that do not apply to them. Contrary to petitioners' argument, this decision is completely consistent with *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979) and other standing decisions of this Court and other courts of

---

[8] The court of appeals relied on the emergency rule that contained the same exclusion for self-insured ERISA plans. The permanent rule cited here became effective January 22, 1995, after this case had been briefed and argued to the court of appeals. 19 State Register 1515 (January 17, 1995).

appeal. There is no conflict and there is no confusion on this issue.

The basic thrust of petitioners' argument is that even though they are not subject to an existing requirement to report data, much less an existing enforcement action based on such requirement, the mere existence of a statute that creates the potential of a future requirement and a future enforcement action is enough to create a case or controversy. Petitioners contend that standing has been conferred by courts in similar circumstances, relying on *Babbitt* and other similar cases. However, petitioners ignore significant distinctions between those cases and the circumstances here.

Babbitt does indicate that in appropriate circumstances a party has standing to challenge a statute without first precipitating an enforcement action under the statute. The appropriate circumstances require that there be a sufficiently credible threat of imminent enforcement. As explained in *Babbitt:*

> When contesting the constitutionality of a criminal statute, "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.". . . . When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."

Babbitt, 442 U.S. at 298 (citations omitted) (bracketed language in original). Petitioners' attempt to apply this language to this case omits several crucial factors and ignores significant distinctions.

First and foremost, the quoted language clearly describes a situation where plaintiff "has alleged an intention to engage in a course of conduct" that is proscribed by a statute, which that plaintiff must forego to avoid a threatened enforcement action. Here, petitioners cannot make that same claim. There is no conduct in which they wish to engage that the challenged statute proscribes. They are simply not in a position of having to change their behavior for fear of prosecution.

Second, although petitioners omitted the phrase in their quotation of this passage, the Court was concerned about protecting conduct "arguably affected with a constitutional interest." For example, *Babbitt* involved a state law regulating agricultural labor relations in ways that arguably infringed First Amendment speech and associational rights. Petitioners have never suggested in this case, nor could they seriously do so, that the conduct at issue here is affected with a constitutional interest.

Third, *Babbitt* requires a "credible threat of prosecution," which petitioners do not face. Unlike the circumstances in several of the cases cited by petitioners, here there has been no past enforcement of the data reporting provisions against ERISA plans, nor is there any current threat of enforcement against ERISA plans. Nor is there an equivocal ad hoc denial of the intention to enforce the requirements against ERISA plans. Rather, the Commissioner of Health has formally enacted a rule that

expressly and unequivocally exempts petitioners from the reporting requirements. The rule has the force and effect of law. *See* Minn. Stat. § 14.38 (1994). Accordingly, no enforcement action against petitioners could be brought without a prior amendment of the rule. Furthermore, the legislature has endorsed the rule by providing for its continued effect.

Finally, although this has not been required in every case, the Court in *Babbitt* was obviously talking about challenges to criminal statutes, where engaging in the proscribed conduct would expose the challenger to arrest and prosecution. The statutes at issue here are not criminal statutes.

The decisions of other circuits that petitioners contend conflict with the decision here conferred standing under circumstances similar to those described in *Babbitt*, but significantly different from those presented here. In *United Food and Commercial Workers International Union v. IPB, Inc.*, 857 F.2d 422 (8th Cir. 1988), plaintiffs challenged a law that imposed restraints on union picketing, activity clearly infused with a constitutional interest. Moreover, the city attorney had indicated not only the authority to enforce the law but had acted to curtail picketing under the law. The plaintiffs wished to engage in the conduct proscribed by the challenged law but had reason to fear arrest due to past enforcement. An affidavit from a state official stating no "present plan" to enforce the law was found by the court to be hesitant, qualified, equivocal and discretionary. In *Michigan State Chamber of Commerce v. Austin*, 788 F.2d 1178 (6th Cir. 1986), the plaintiffs challenged a statute that limited corporate contributions to

ballot question committees, again involving conduct protected by the First Amendment. Officials had made known their intention to enforce the law, presenting the plaintiffs with the choice of either foregoing arguably protected activity or facing prosecution. In *KVUE, Inc. v. Moore*, 709 F.2d 922 (5th Cir. 1983), *aff'd sub nom. Texas v. KVUE, Inc.*, 465 U.S. 1092 (1984), the challenged state law prescribed rates for television and radio political advertising and required such advertisers to identify the sponsor, again involving constitutionally-protected conduct. The court found that a county attorney's affidavit concerning lack of intent to prosecute was equivocal and that the state had not disavowed enforcement activity. *Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987), involved a statute that prohibited distribution of anonymous campaign literature. Plaintiff alleged that he had refrained from continuing to distribute such literature because he had been arrested for violation of the law in the past. The court found that the threat of prosecution created an ongoing injury from the chill of the plaintiff's First Amendment Rights. *Signorelli v. Evans*, 637 F.2d 853 (2d Cir. 1980), presented a challenge to a New York law that required a judge to resign before running for other public office. The court held that because of the serious adverse consequences if a judge ran for office and violated the statute, he need not violate the statute first before challenging its constitutionality. There was no suggestion in the case that the plaintiff would not be subject to enforcement. Finally, *Seattle School District No. 1 v. Washington*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982), involved a challenge by a school district to a state law that restricted its efforts to achieve racial balance. The court held that

despite the lack of a specific threat of prosecution for violation of the statute, four factors indicated a live case or controversy: (1) the statute was highly specific and applied to the plaintiff's school district; (2) this was a recent law that had not been moribund for years; (3) threats of immediate enforcement had been made against identically situated parties; and (4) this was a civil statute that imposed an affirmative duty to comply. None of the factors that gave rise to standing in each of these circuit court decisions are present here, and accordingly the decision of the Eighth Circuit is not in conflict.

Far from being a case that permits a plaintiff to challenge a statute before it is enforced, this is a case at the other end of the spectrum as described in *Babbitt:*

> But "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." . . . When plaintiffs "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible," they do not allege a dispute susceptible to resolution by a federal court.

Babbitt, 442 U.S. at 298-99 (citations omitted). That description applies fully to this case.

A further reason that petitioners' standing issue does not warrant review by this Court is that it turns on the interpretation of Minnesota state law. Petitioners themselves explain: "In order to determine whether Petitioners suffered an injury that warrants standing under Article III of the United States Constitution, the interpretation of the MinnesotaCare statute is the ultimate touchstone."

Pet. at 14. Petitioners argue that the Eighth Circuit and apparently the Minnesota Commissioner of Health misinterpreted the effect of the discrepancies among the provisions of the MinnesotaCare Act and the commissioner's authority to resolve those discrepancies as she did. Even if petitioners were correct, and the commissioner, the district court and the Eighth Circuit were wrong, there is no sound reason why this Court should expend its limited resources merely to correct a misinterpretation of state law. Moreover, the recent legislation expressly continuing the rules in effect clearly indicates that the commissioner's promulgation of the exemption was consistent with legislative intent.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

RICHARD S. SLOWES
Assistant Solicitor General
Counsel of Record

1100 NCL Tower
445 Minnesota Street
St. Paul, MN 55101
(612) 282-5712

Counsel for Respondents

Dated: February 1996